

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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PLR-139546-07

Date: January 16, 2008

TY:

Taxpayers=

Taxpayer-Husband=

Year1=

Year2=

Year3=

Date1=

X=

\$a=

Dear :

This is in response to your letter dated August 29, 2007. In your letter you requested an extension of time to make a late election on Form 4952, Investment Interest Expense Deduction, under §§ 163(d)(1) and 163(d)(4)(B) of the Internal Revenue Code for Year1, Year2, and Year3. The request to make the late election is based on §§ 301.9100-1 and 301.9100-3 of the Procedure and Administration Regulations

FACTS

Taxpayers timely filed Form 1040, Individual Income Tax Return, for Year1, Year2, and Year3. Taxpayer-Husband is X years of age and has always prepared their joint tax returns manually without the use of computer software.

An examination of the Year1 return was conducted on . The primary focus of the exam was investment interest expense. The exam resulted in a no change. Taxpayers were never made aware that they needed to include Form 4952, Investment Interest Expense Deduction.

An examination of the Year2 return was conducted. Adjustments were made to short term capital gains and itemized deductions. Taxpayers disagreed with Form 4549, Income Tax Examination Changes. Taxpayers filed Form 872, Consent to Extend the Time to Assess Tax for tax year ended Date1, and requested the examination be forwarded to Appeals.

The Appeals Officer made an adjustment allowing itemized deductions that were disallowed on the original Form 4549. However, Form 4952, Investment Interest Expense Deduction, was not considered since a timely election had not been made.

Taxpayers presented to the Appeals Officer that they received conflicting information from the Service. The Appeals Officer suggested that due to the conflicting information provided by the Service, Taxpayers may wish to file a Private Letter Ruling requesting permission to make a late election on Form 4952. Taxpayers have paid the sum of \$a which represents the correct balance due based on adjustments to income and Form 4952.

APPLICABLE LAW

Section 163(d)(1) of the Code provides that in the case of a taxpayer other than a corporation, the amount allowed as a deduction for investment interest for any taxable year shall not exceed the net investment income of the taxpayer for the taxable year.

Section 163(d)(4)(B) of the Code provides, in pertinent part, that investment income means the sum of --

- (i) gross income from property held for investment (other than any gain taken into account under clause (ii)(I)),
- (ii) the excess (if any) of --
 - (I) the net gain attributable to the disposition of property held for investment, over
 - (II) the net capital gain determined solely by taking into account gains and losses from dispositions of property held for investment, plus
- (iii) so much of the net capital gain referred to in clause (ii)(II) (or, if lesser, the net gain referred to in clause (ii)(1)) as the taxpayer elects to take into account under this clause.

Section 1.163(d)-1 (b) of the regulations provides that the election under

§ 163(d)(4)(B)(iii) must be made on or before the due date (including extensions) of the income tax return for the taxable year in which the net capital gain is recognized.

Section 1.163(d)-1(c) of the regulations provides that the election under § 163(d)(4)(B)(iii) is revocable with the consent of the Commissioner.

Sections 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-1(b) of the regulations defines the term "regulatory election" as an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice or announcement published in the Internal Revenue Bulletin.

Section 301.9100-1(c) of the regulations provides that the Commissioner may grant a reasonable extension of time to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) of the regulations provides that requests for extensions of time for regulatory elections (other than automatic changes covered under § 301.9100-2) will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) of the regulations provides that a taxpayer will be deemed to have acted reasonably and in good faith if the taxpayer --

- (i) requests relief before the failure to make the regulatory election is discovered by the Service;
- (ii) inadvertently failed to make the election because of intervening events beyond the taxpayer's control;
- (iii) failed to make the election because, after exercising due diligence, the taxpayer was unaware of the necessity for the election;
- (iv) reasonably relied on the written advice of the Service; or

- (v) reasonably relied on a qualified tax professional, and the tax professional failed to make, or advise the taxpayer to make the election.

Section 301-9100-3(b)(3) of the regulations provides that a taxpayer will not be considered to have acted reasonably and in good faith if the taxpayer --

- (i) seeks to alter a return position for which an accuracy-related penalty could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires a regulatory election for which relief is requested;
- (ii) was fully informed of the required election and related tax consequences, but chose not to file the election; or
- (iii) uses hindsight in requesting relief. If specific facts have changed since the original deadline that make the election advantageous to a taxpayer, the Service will not ordinarily grant relief.

Section 301.9100-3(c)(1) of the regulations provides that the Commissioner will grant a reasonable extension of time only when the interests of the Government will not be prejudiced by the granting of relief. Under paragraph (c)(1)(i), the interests of the government are prejudiced if granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made.

CONCLUSION

Taxpayers' election is a regulatory election, as defined under § 301-9100-1(b), because the due date of the election is prescribed in the regulations under § 1.163(d)-1(b). In the present situation, the requirements of §§ 301.9100-1 and 301.9100-3 of the regulations have been satisfied. The information and representations made by Taxpayers establish that Taxpayers acted reasonably and in good faith with this request. Furthermore, granting an extension will not prejudice the interests of the Government. It is represented that Taxpayers will not have a lower tax liability in the aggregate for all taxable years affected by the election if given permission to make the election in the appropriate amount at this time than Taxpayers would have if the election were made in the appropriate amount by the original deadline for making the election. Accordingly, Taxpayers are granted an extension of time for making the election until 60 days following the date of this ruling.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling. The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Thomas D. Moffitt
Thomas D. Moffitt
Chief, Branch 2
(Income Tax & Accounting)

cc: